89-261

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

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BURTON ROBERT BERMAN,

Petitioner,

v.

STATE BAR OF CALIFORNIA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the California Supreme Court's decision incorporating the State Bar Court's findings based on the admission of evidence in flagrant violation of California Penal Code Section 632(d) deprived Petitioner of due process of law?

B. Whether the incorporation of the State Bar Court's findings based on evidence inadmissible in any other California proceeding deprived Petitioner of equal protection under the law?

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Petitioner BURTON ROBERT BERMAN respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California made final on May 23, 1989.

OPINION BELOW

The Supreme Court of the State of California made final its decision to disbar Petitioner by denying a Petition for Rehearing on May 23, 1989. A copy of the opinion, reported at 48 Cal.3d 517 (1989), is attached as Appendix A.

JURISDICTION

On May 23, 1989 the Supreme Court of the State of California entered its denial of Petitioner's Petition for Rehearing [App. B]. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

STATUTES CONSIDERED

The statute of the State of California involved in this case is Penal Code Section 632(d):

> No evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be

admissible in any judicial, administrative, legislative or other proceeding.

STATEMENT OF THE CASE

On April 3, 1989 the Supreme Court of the State of California ordered Petitioner BURTON ROBERT BERMAN disbarred, upholding the California State Bar Hearing Examiner's findings and recommendation as adopted by the State Bar Court Review Department. The disciplinary proceeding commenced following Petitioner's conviction for the malum prohibitum offense, not involving moral turpitude, of conspiring to transfer more than $5,000.00 outside the United States without filing a report of as required by law after being federally indicted for traveling in interstate commerce to distribute proceeds of illegal activities and making false statements in a vain attempt to procure bank loans. The

California Supreme Court referred the matter to the State Bar Court for a determination as to whether the underlying facts and circumstances showed moral turpitude and what, if any, discipline was appropriate.

The State Bar Court Review Department found that Petitioner had "intended to assist drug dealers in laundering funds from their unlawful activities; that [Petitioner] <u>believed</u> that the financial statements to be created by the FBI agents would contain false information and intended that these statements be submitted to banks . . . to induce loans . . . ." (Appendix A ("App. A") at 11), <u>In re Berman</u>, 48 Cal.3d at 523 (emphasis in original). These findings were based on the statutorily inadmissible tapes and transcripts. In fact, the Hearing Referee stated that he had

"listened to all of the tapes all the way through, . . . compared the transcripts to the tape[s], . . .[and] also read the transcripts which are in evidence . . . ." [R.T. 81]. ["R.T." refers to the reporter's transcript of proceedings, volumes one through three, dated July 12, July 23, and August 7, 1987]. The State Bar Court Review Department recommended disbarment; the California Supreme Court also adopted these findings, in spite of the fact that they were founded on statutorily inadmissible evidence.

The use of the inadmissible tapes and transcripts deprived Petitioner of due process of law and violated Petitioner's right to equal protection under the law. These issues were raised before the California Supreme Court by way of Petition for Rehearing immediately following that Court's erroneous ruling.

REASONS FOR GRANTING THE WRIT

A. The California Supreme Court's Decision Incorporating the State Bar Court's Findings Based on the Admission of Evidence in Flagrant Violation of California Penal Code Section 632(d) Deprived Petitioner of Due Process of Law.

Under California and federal law, bar disciplinary proceedings are adversary and quasi-criminal in nature. In re Ruffalo 390 U.S. 544, 551 (1968); Emslie v. State Bar, 11 Cal.3d 210, 229 (1974). Due process must be accorded to Petitioner in order to protect him from the arbitrary deprivation of his professional license. Ruffalo, 390 U.S. at 550; Emslie, 11 Cal.3d at 229. As this Court made clear in Schware v. Board of Examiners, 353 U.S. 232, 238-39 (1957), "[a] State cannot exclude a person from the practice of law or any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth

Amendment." California law, Penal Code Section 632(d), requires that the evidence used to disbar Petitioner not be admitted. The State Bar's counsel, the Hearing Examiner, the State Bar Court Review Department, and the California Supreme Court extensively relied on the unlawfully admitted tapes and transcripts.

The opinion of the California Supreme Court recognizes that the Hearing Referee's finding of moral turpitude was "[b]ased upon the evidence presented . . . ." (App. A at 10), 48 Cal.3d at 522. This evidence included the hearing examiner's detailed examination of the lengthy and damaging tapes and transcripts. The State Bar Court's Review Department "agreed with the referee's opinion, making only slight changes to it." (App. A at 11), 48 Cal.3d at 523. This evidence formed an integral part of

the decision-making process.

The State Bar's case at the hearing relied primarily upon the recordings and their transcripts. The State Bar's closing argument before the Hearing Referee had no fewer than 30 citations to the transcripts [R.T. 107-123]. Moreover, counsel for the State Bar clearly articulated its reliance upon the recordings to prove Petitioner's intentions:

> As to the financial statements, it is very rare in any court proceeding when it can be proven what someone's intent was. It can only really be inferred, and to that we have to look at the acts and words of people involved in the conduct, and we have to look to [Petitioner's] acts, and his conduct, his word spoken on these tapes at the time these incidents were happening [R.T. 146] (emphasis added).

The importance of these inferences drawn from the contents of the

inadmissible tapes and transcripts cannot be overstated. The State Bar never proved the financial statements to be false. Agent Hanlon in his own testimony admitted that the financial statements of Champion Mortgage Company were valid [R.T. 102]. Also, it was never proven that the financial statement of Energy Plus was "bogus;" Petitioner's Exhibit C, admitted at the hearing, showed that the validity of the financial statement was proven in another case in the District of Massachusetts [R.T. 161-162]. The State Bar Court recommended Petitioner's disbarment solely because of his intentions; the State Bar proved these intentions by the tapes and transcripts.

The California Supreme Court acknowledged in its opinion that any evidence obtained in violation of California Penal Code Section 632(d) is

inadmissible in any judicial, administrative, legislative, or other proceedings. (App. A at 16), 48 Cal.3d at 524. The Court specifically held that the hearing referee's definition of the term "confidential communication" was inconsistent with Section 632(c). (App. A at 16, n. 4), 48 Cal.3d at 524 n. 4. The Court did not, however, decide whether the evidence of the recordings and their transcripts were inadmissible at the disciplinary hearing "because, even assuming the inadmissibility of the recordings and the transcripts, there is sufficient evidence to support the department's findings." (App. A at 17), 48 Cal.3d at 524. Such a conclusion flies in the face of California law and the court's own decision.

Under California law, the evidence admitted by the hearing referee should

have been excluded. Even though, as the California Court noted, the tapes and transcripts could legally have been used to refresh the witness's recollection or for some other non-evidentiary purpose, they were not. They were used as the most damning and critical evidence in the case against Petitioner. The State Bar Court Review Department's findings and conclusions must be vacated because "it is reasonably probable that a result more favorable to [Petitioner] would have been reached in the absence of the error" of admitting the recordings and their transcripts. People v. Watson, 46 Cal.2d 813, 836 (1956); People v. Leach, 15 Cal.3d 419, 445 (1975). The court below put "great weight" on the State Bar Review findings. (App. A at 13), 48 Cal.3d at 523. It makes sense to look to the fact-finding process and conclusions from the

trial below when reviewing the fact-finder's conclusions. In this case, however, those conclusions were tainted by the admission of and reliance on statutorily inadmissible evidence which was used for that purpose alone.

The use as evidence of the tapes and transcripts amounted to a deprivation of due process. The findings of the hearing referee, as adopted by the State Bar Court Review Department and the California Supreme Court, must be vacated; a new hearing without that evidence must be ordered.

B. The Incorporation of the State Bar Court's Findings Based on Evidence Inadmissible in any other California Proceeding Deprived Petitioner of Equal Protection Under the Law.

California Evidence Code Section 353 provides for the reversal of any "finding," including the findings of the hearing referee, if the complaining party

properly objected to the admission of the evidence and that the error complained of resulted in a miscarriage of justice. Petitioner properly objected to all the tapes and transcripts. (App. A at 10), 48 Cal.3d at 522. The tapes and transcripts, used as independent evidence and as independent corroboration of Agent Hanlon's testimony of events which took place five years before, formed the backbone of the hearing referee's findings. If the evidence admitted against Petitioner had been admitted in a criminal trial, any conviction resulting from the trial would be reversed under California law. People v. Jones, 30 Cal. App. 3d 852 (1973); see also People v. Conklin, 12 Cal.3d 259, 272 (1974). Allowing the evidence to be used in Petitioner's quasi-criminal disbarment trial, although a professional license was

at stake rather than incarceration, treated Petitioner differently from others similarly situated in criminal or civil litigation.

As discussed more fully above, a state must accord equal protection under its laws when it attempts to strip a professional license. Schware v. Board of Examiners, 353 U.S. 232, 238-39 (1957). The key issue in the equal protection analysis is what standard of review applies. The Constitution requires strict scrutiny of a law, upholding the law only if a compelling government interest can be served in no other way than by the operation of that law, when the law affects adversely a suspect class, such as race, national origin, or alienage, or a fundamental right which is explicitly or implicitly guaranteed by the Constitution. San Antonio Independent School District v.

Rodriguez, 411 U.S. 1, 28, 33-34 (1973).

Petitioner does not fall within a suspect class. Petitioner's right to continue practicing law may not be a fundamental right, but it appears to be a right sufficiently important to call for heightened if not strict scrutiny of the constitutionality of a decision omitting this right from the protection of the exclusionary rule which applies to all other criminal and civil cases.

Ordinarily, if a law as applied does not affect a fundamental right or a member of a suspect class, this Court upholds the law under the minimum scrutiny or rational basis test unless the law serves no valid governmental interest and is arbitrary and capricious, without regard to the wisdom or propriety of the law. See McGowan v. Maryland, 366 U.S. 420 (1961). Because the laws governing

the practice of law are sui generis and because the state has a legitimate concern in policing its bar, see Goldman v. State Bar, 20 Cal.3d 130, 139-40 (1977), the California Supreme Court's construction of Penal Code Section 632(d) to deny protection to attorneys facing disbarment proceedings would likely withstand this challenge if the minimum scrutiny or rational basis test were to be applied. However, if the law infringes an important right which does not rise to the level of being "fundamental," a higher level of judicial scrutiny is applied. Petitioner's right to practice law involves just such an important right calling for strict or at least heightened scrutiny. As this Court said long ago in Dent v. West Virginia, 129 U.S. 114, 121-122 (1889): "It is undoubtedly the right of every citizen of the United States to

follow any lawful calling, business, or profession he may choose . . . ." Any conditions on or regulations of such a right must "have a rational connection with the applicant's fitness or capacity to practice" the profession. Schware, 353 U.S. at 239. In Schware, the Court did not simply defer to the conclusions of the Supreme Court of New Mexico, but rather looked to the factual record itself to determine "whether the Supreme Court of New Mexico on the record before us could reasonably find that he had not shown good moral character." 353 U.S. at 239.

The fact-based analysis of this intermediate or "heightened scrutiny" test requires that a distinction or infringement rest upon some ground having a fair and substantial relation to the objectives of the law and that those objectives are sufficiently important to

allow the distinction or infringement. See Reed v. Reed, 404 U.S. 71, 76 (1971), see also City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985). Under this standard, the party maintaining the validity of the classification, in this case the California State Bar, must prove that the classification is substantially related to an important government interest and that no other means of accomplishing the objectives of the law are practicable. See Craig v. Boren, 429 U.S. 190 (1976).

It is beyond dispute that the state has a legitimate and important function in disciplining attorneys who have committed acts of moral turpitude. The issue is not whether this function is important, but whether this function can be accomplished without suspending or ignoring Penal Code Section 632(d) during disbarment

proceedings and no others. The California Court observed that, even assuming the tapes and transcripts are inadmissible, "there is sufficient evidence to support the department's findings." (App. A at 17), 48 Cal.3d at 524. However, as set forth more fully above, those findings are based upon the evidence that was in fact admitted into evidence at the trial and relied upon by both the Hearing Examiner and the State Bar Review Department. Allowing such evidence to be used in a disbarment proceeding when its use would be disallowed under Penal Code Section 632(d) in any other civil, criminal, judicial, or administrative hearing denied Petitioner equal protection under the laws of the State of California as interpreted and applied by the California Supreme Court.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California.

Respectfully Submitted,

8/8/89
Date

K Noel
Kenneth D. Noel,
Attorney for Petitioner

PROOF OF SERVICE

I, the undersigned, say:

1. I am over eighteen years of age, a resident of San Diego County, Ca., and not a party to this action.

2. My business address is 3535 Fourth Ave., San Diego, Ca. 92103.

3. On this date I served the PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA on opposing counsel by placing true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail addressed to:

State Bar of California
555 Franklin Street
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 9, 1989 at San Diego, Ca.

K Noel

Kenneth D. Noel

APPENDICES

[No. SOO5981. Apr. 3, 1989.]

In re BURTON ROBERT BERMAN on Disbarment.

We review the recommendation of the Review Department of the State Bar Court (hereinafter department) that Petitioner Burton Robert Berman be disbarred from the practice of law in California. Berman maintains that certain recordings and transcripts of numerous telephone conversations and meetings were improperly admitted into evidence at his State Bar hearing. He requests that his case be remanded for further consideration absent such evidence. After considering the record and Berman's objections, we conclude that the department's findings and its recommendation of disbarment are appropriate.

I. FACTS

Burton Robert Berman was admitted to

the California State Bar on June 29, 1973. During all relevant times, Berman was the general counsel and part owner of Champion Mortgage Company, which marketed and serviced mortgages and loans secured by trust deeds on real property.

Berman first came to the attention of the Federal Bureau of Investigation (FBI) in June of 1981. At that time the FBI was investigating an individual had financial dealings with a company Berman represented. Although that investigation did not result in criminal proceedings against Berman, the FBI subsequently began a separate investigation of him. The subsequent investigation of Berman commenced after he told FBI informant James Fallacaro that he was looking for contacts with bankers, Wall Street brokers and drug dealers interested in investing

in an offshore deal.

The FBI investigation occurred from approximately September through December 1982 and involved two agents: John Hanlon and Robert Cassidy. Agent Hanlon worked undercover, posing as a person with connections to banks in Florida and contacts with persons involved in illegal activities. Agent Cassidy, also working undercover, posed as a person interested in "laundering" money earned through the trafficking of illegal drugs. James Fallacaro, an FBI informant posing as a person with contacts in the financial centers of New York and Miami, was also involved in the investigation.

The investigation involved numerous meetings and telephone conversations between FBI agents and Berman and Vincent

Coniglio, who was Berman's business partner. During these conversations Berman proposed a scheme to "launder" money earned through the sale of illegal drugs. The scheme, as described by Berman, involved setting up a corporation in the Grand Cayman (the offshore corporation). The offshore corporation would have a bank account at the Royal Bank of Canada. The plan involved moving money earned through the unlawful sale of drugs from the United States to Canada without reporting the transfer to United States officials as required by law. The money would be put into the Royal Bank of Canada account, transferred to the offshore corporation and then used to purchase mortgages from Champion Mortgage Company. Champion Mortgage Company would service the mortgages, accepting payments, deducting its commission and depositing

the balance in the Royal Bank of Canada account. Berman represented to agents Hanlon and Cassidy that there would be no way to trace the funds to Cassidy and that all transactions would appear to be legitimate business dealings of an offshore corporation.

To demonstrate the feasibility of his plan, Berman explained to agent Hanlon present the combined financial statement of Champion Mortgage Company and Energy Plus, a company owned by Luis Barcello, to banks and other financial institutions in order to induce loans and other forms of credit. During the course of the investigation Berman requested that agent Hanlon assist him in updating the combined

financial statement.[1] Berman expressed little concern when informed by agent Hanlon that the updated combined financial statement would contain false information. Moreover, Berman indicated that he wanted the statement to show "heavy cash" in order to enhance the chances of obtaining loans and other forms of credit. Berman requested agent Hanlon to give the updated statement, which was to contain false financial information, to agent Hanlon's contacts in the Florida banking industry.

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[1]Although unclear, the evidence elicited at the State Bar hearing indicates that the combined financial statement as originally provided to agent Hanlon by Berman probably contained misleading information. The financial information on Champion Mortgage Company was apparently accurate. However, the financial information on Energy Plus had apparently become "stale." It is unclear whether Berman knew at the time he first provided the combined financial statement to agent Hanlon that the financial information on Energy Plus was no longer current.

Throughout the investigation, most of the conversations between Berman and the FBI agents were tape recorded. Transcripts of the conversations were then made from the tape recordings. These are recordings and transcripts of three meetings in which agent Hanlon and Berman participated. At two of these meetings agent Cassidy was also present. The recordings and transcripts of the telephone conversations also include at least eight separate conversations between Berman and agent Hanlon. In addition, several telephone conversations between Berman and informant James Fallacaro were recorded.

On or about June 16, 1983, Berman was indicted in the United States District

Court, Southern District of Florida.[2] The five-count indictment against Berman included charges of: (1) knowingly and intentionally making false statements and reports and willfully overvaluing properties or securities for the purpose of influencing the actions of certain financial institutions upon an application for loans, warehousing lines of credit and commitments, in violation of 18 United States Code sections 2 and 1014; and (2) conspiracy to knowingly and intentionally travel in interstate and foreign commerce and use facilities in interstate and foreign commerce with the intent to distribute the proceeds of unlawful activities, in violation of 18 United States Code sections 371 and 1952.

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[2]Vincent Coniglio and Luis Barcello were indicted along with Berman.

Berman thereafter entered into a plea bargain with the United States Attorney whereby he agreed to plead guilty to knowingly and intentionally conspiring to transport monetary instruments of more than $5,000 at one time from a place in the United States to or through a place outside the United States without filing a report as required by law, in violation of 18 United States Code section 371 and 18 United States Code sections 5316 and 5322(a). On January 13, 1986, Berman pled guilty and was sentenced to one year imprisonment stayed on conditions of probation, including thirty days' actual confinement and a five-year period of probation, and was fined $1,000.

II. STATE BAR PROCEEDINGS

The State Bar conducted hearings on July 21, 23 and August 7, 1987. Berman did not testify at the hearing; the only

witness was agent Hanlon, who testified extensively as to his participation in the investigation. Over Berman's objection, the hearing referee admitted into evidence the tape recordings and transcripts of telephone conversations occurring between September 20, and December 14, 1982. Also admitted into evidence over Berman's objection were the recordings and transcripts of the three meetings occurring on November 2, November 16, and December 16, 1982. Prior to testifying agent Hanlon reviewed the recordings and transcripts of the telephone conversations and meetings in order to refresh his recollections of the events.

Based upon the evidence presented, the hearing referee concluded that Berman's conduct involved moral turpitude. The referee also noted that Berman had

been publicly reproved by the State Bar of California on May 17, 1982, for willfully failing to perform all the services for which he was retained. The referee stated that while this prior disciplinary actions was remote as to subject matter, it was relevant as to time because Berman undertook the present course of conduct within a few months of receiving reproval. For these reasons, the referee recommended that Berman be disbarred.

The review department agreed with the referee's opinion, making only slight changes to it. The department concluded that Berman's actions were intended to assist drug dealers in laundering funds from their unlawful activities; that Berman <u>believed</u> that the financial statements to be created by the FBI agents would contain false information and

intended that these statements be submitted to banks or other financial institutions to induce loans and other forms of credit for Champion Mortgage Company; and that Berman acted for the purpose of achieving his own financial gain. In addition, the department noted that the only evidence of mitigation submitted by Berman was that he was 63 years old and had 3 children ranging in age from 20 to 28.

III. DISCUSSION

In reviewing the findings of the department, this court must exercise its independent judgment to determine whether the facts and circumstances of Berman's case justify the discipline recommended. (In re Ford (1988) 44 Cal.3d 810, 815 [244 Cal.Rptr. 476, 749 P.2d 1331]; In re Vaughn (1985) 38 Cal.3d 614, 618 [213 Cal.Rptr. 583, 698 P.2d 651.) However, the

department's recommendation is entitled to great weight, and it is Berman who bears the burden of showing that the department's findings are not supported by the evidence or that its recommendation as to the appropriate degree of discipline is erroneous or unlawful. (In re Ford, supra, 44 Cal.3d at pp. 815-816.) Berman must demonstrate that the charges of unprofessional conduct are not sustained by convincing proof to a reasonable certainty. (Kapelus v. State Bar (1987) 44 Cal.3d 179, 184 [242 Cal.Rptr. 196, 745 P.2d 917].)

Berman does not deny that the facts, as set forth in the record, occurred. Nor does he assert that the department's recommendation of disbarment is erroneous or unlawful in light of the facts. Rather, his only contention is that the recordings

and transcripts of the telephone conversations and meetings were improperly admitted into evidence at his disciplinary hearing. He seeks to have his case remanded for reconsideration absent the recordings and transcripts.

Berman asserts that the recordings and transcripts made form the recordings were inadmissible un Penal Code section 632.[3] Penal Code section 632, subdivision

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[3]Penal Code section 632 states in relevant part: "(a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred ($2,500), or imprisonment in the county jail not exceeding one year or in the state prison, or by both that fine and imprisonment . . .(b) The term 'person' includes an individual, business

(a), prohibits a party to a confidential communication from recording a conversation without the consent of the other party to the communication. It applies to confidential communications

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association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording the communication. (c) The term 'confidential communication' includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires to be confined to the parties thereto, but excludes communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded. (d) Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding . . ."

occurring over telephone or while the parties are in each other's presence. Evidence obtained in violation of this statute is inadmissible in "any judicial, administrative, legislative, or other proceeding." (Pen. Code, Section 632, subd. (d).) Berman contends that the recordings made by the FBI agents violated Penal Code section 632, because he intended the conversations with the FBI agents to be private and did not know or consent to the conversations being recorded. Thus, Berman concludes that the recordings and the transcripts of the recordings should not have been admitted as evidence at his disciplinary hearing.[4]

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[4]The hearing referee held that the recordings and transcripts were admissible because they involve communications reflecting an intent to violate the law and therefore were not "confidential" within the meaning of section 632, subdivision (c). This definition of "confidential communication" is not

It is unnecessary to address Berman's contentions because, even assuming the inadmissibility of the recordings and transcripts, there is sufficient evidence to support the department's findings. Agent Hanlon testified for approximately one and a half days regarding the undercover investigation of Berman. Because he participated in the relevant meetings and telephone conversations, Hanlon was able to testify from personal knowledge as to the substance of the investigation. Furthermore, he was the only witness at Berman's disciplinary hearing, and Berman introduced no evidence materially contradicting agent Hanlon's testimony.

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consistent with the one provided in subdivision (c).

Agent Hanlon testified that at the November 2, 1982, meeting he introduced Berman to agent Cassidy, who was represented as being engaged in the drug business, and that Berman explained the details of the money laundering scheme. Agent Hanlon also testified about his participation in the November 16, 1982, meeting with Berman, agent Cassidy and Vincent Coniglio. He testified that at the meeting Berman again outlined the money laundering scheme and that agent Cassidy indicated his willingness to invest large sums of money in the operation. Finally, agent Hanlon testified that at the December 6, 1982, meeting, which occurred after Berman was informed of the unsuccessful attempt to carry money into Canada, Berman outlined alternative plans for moving money out of the United States through United States branch offices of

the Royal Bank of Canada or banks located in Mexico.

Agent Hanlon also gave testimony regarding many of the key telephone conversations he participated in with Berman. For example, agent Hanlon stated that during a telephone conversation occurring sometime subsequent to November 2, 1982, Berman sought his help in updating the combined financial statement of Champion Mortgage and Energy Plus. Agent Hanlon testified that in two separate telephone conversations he told Berman that the financial statement would contain false information, and that during one telephone conversation they discussed, and settled upon, how much cash the financial statement should show. Agent Hanlon testified that Berman instructed him to give the altered financial

statements to this contacts in the Florida banking industry. In sum, the substance of agent Hanlon's testimony is sufficient to support the relevant findings of fact made by the department, especially since Berman does not contend the validity of these facts.

Still assuming that the recordings and transcripts are inadmissible, the fact that agent Hanlon used them to refresh his memory does not affect the admissibility of his testimony. When a writing is used to refresh a witness's memory, the writing itself has no independent evidentiary value for the party calling the witness and is not admissible into evidence at that party's instance.[5] (3 Witkin, Cal.

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[5]Present recollection refreshed should be distinguished from past recollection recorded, where the writing has independent evidentiary value. For

Evidence (3d ed. 1986) Section 1835, p. 1792.) Memory may be refreshed using a writing that is not admissible into evidence. (See People v. Wojahn (1959) 169 Cal.App.2d 135, 141-142 [337 P.2d 192; 3 Witkin, Cal. Evidence, supra, Section 1833, pp. 1790-1791.) Evidence Code section 771, subdivision (a), merely requires that "if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced,

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past recollection recorded the witness must have insufficient present recollection to enable him or her to testify fully and accurately. (See Evid. Code, Section 1237.) If the writing meets the requirements set forth in Evidence Code section 1237, subdivision (a), then it may be read into evidence at the instance of the party calling the witness.

the testimony of the witness concerning such matter shall be stricken."[6] The recordings and transcripts in this case were apparently made available to Berman by at least the time of trial. Consequently, agent Hanlon's use to the transcripts to refresh his memory was not improper.

IV. CONCLUSION

The facts reveal that Berman used his legal skills to propose a plan that would result in the laundering of money that he believed to be obtained through the sale of drugs. The facts also indicate that Berman sought to have financial statements that he believed would contain false

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[6]If the writing is produced at the hearing, then Evidence Code section 771, subdivision (b), allows the adverse party to inspect the writing, to cross-examine the witness concerning the writing, and to introduce into evidence pertinent parts of the writing.

information given to banks in order to obtain loans and lines of credit for his company. Berman's belief that the financial statements contained false information reflects sufficient indicia of fraudulent intent to constitute moral turpitude. (See In re Hallinan (1954) 43 Cal.2d 243, 247-248 [272 P.2d 768].)

The only evidence offered by Berman in mitigation were the facts that he is 63 years old and has 3 children. This must be viewed in light of the aggravating circumstances that Berman was publicly reproved by the State Bar of California on May 17, 1982, for willfully failing to perform all the services for which he was retained. We agree with the department that, while this infraction is remote as to subject matter, it is not remote as to time. In short, Berman's conduct was

"inimical both of the high ethical standards of honesty and integrity required of members of the profession and to promoting confidence in the trustworthiness of members of the legal profession." (In re Bloom (1987) 44 Cal.3d 128, 136 [241 Cal.Rptr. 726, 745 P.2d 61.)

In light of the seriousness of his actions and the mitigating and aggravating circumstances, it is ordered that petitioner Robert Burton Berman be disbarred and that his name be stricken from the roll of attorneys in this state. It is further ordered that he comply with the requirements of rule 955 of the California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, of the effective date of this order. This order is effective upon

the finality of this decision in this court.

ORDER DENYING REHEARING

No. SOO5981

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

IN RE BURTON ROBERT BERMAN

ON DISBARMENT

Petitioner's petition

for rehearing DENIED.

[filed May 23, 1989]

/s/
Chief Justice

APPENDIX B